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No. 85-1750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

S/S SALVADOR, her engines, boilers, etc., and
A/S IVARANS REDERI,

Petitioners,

—against—

BERISFORD METALS CORPORATION,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF STAR SHIPPING A/S IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of the Supreme Court, Star Shipping A/S (hereinafter "Star" or "Amicus Curiae") hereby moves this Honorable Court for leave to file the annexed brief as *Amicus Curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. Consent to the filing of the brief was sought from, but not granted by respondent Berisford Metals Corporation.

Star is a Norwegian-based shipping organization which operates a fleet of over 40 vessels, the majority of which are designed for containers and unitized cargo. Star offers a multimodal liner service for containerized cargo between Japan and the United States and between Europe and the United

States. This service includes, in addition to ocean carriage, "microbridge" and "minibridge" transportation.[1]

Under this comprehensive transportation system, containerized cargo may be shipped overland from such points as Tokyo, Kobe or Nagoya (Japan) to be loaded aboard a Star vessel at Osaka or Yokohama; thence transported by sea to Tacoma, Washington and, finally, inland, by rail or truck, to any one of more than thirty-five U.S. cities. In its European trade, Star also provides a "feedering" service to transport containerized cargo by water aboard a "feeder" vessel for eventual shipment to the United States aboard a "mother" vessel operating out of such ports as Antwerp, Gothenburg and Le Verdon.

In the captioned proceeding, the Second Circuit Court of Appeals has ruled that an ocean carrier's liability for a bill of lading misrepresentation, however innocent, concerning the quantity or weight of cargo is to be that of an insurer. The $500 per package limitation of the ocean carrier's liability for damages, which by treaty and implementing statute[2] applies "in any event", is not to be applied in *this* event. To avoid imposition of insurer's liability in circumstances where an "on board" bill of lading is issued, ocean carriers must *at the very least* weigh every container at shipside *immediately* before it is loaded on board.[3]

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1 The term "microbridge" is used to describe an arrangement under which shipments are picked up from the shipper's premises and/or delivered directly to the consignee's premises or other inland points. "Minibridge" service provides for overland transportation from one port to another. (Thuong and Collison, *In Search of a Coherent Policy on International Intermodal Transportation*, 16 J. Mar. L. & Com. 397, n.1).

2 Section 4(5) of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 *et seq*. (1936) implementing the "International Convention for the Unification of Certain Rules of Law Relating to (Ocean) Bills of Lading" (The Hague Rules), signed at Brussels on August 25, 1924, 51 Stat. 233, T.S. 931, 120 L.N.T.S. 155, 157, 183 (June 29, 1937).

3 The Court of Appeals acknowledged (but did not go so far as to agree with) defendants' argument that an ocean carrier cannot be

As a multimodal/container carrier, it is of vital interest to Star that this Honorable Court be apprised of the severely adverse impact which this decision will unquestionably have on the profitable use of containers for ocean carriage and on the continued development of an efficient, cost-effective multimodal transportation system. The tremendous savings which the "container revolution" has brought about in the form of reduced handling and labor costs, lower freight rates, increased protection against pilferage and damage to cargo, and greater profitability for vessels because of reduction of time spent in port[4] will simply be lost if the decision below stands. The decision can also be expected to critically interfere with the burgeoning development of multimodal container transportation, the great benefit of which, *inter alia*, is to reduce delivery time by permitting the transfer of containers from one mode to another with little delay for handling.[5]

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expected to open and tally the contents of each and every container (*Petition*, p. 16a). However, in light of the Court's most general statement that defendants were ". . . responsible for verifying the contents before loading the containers and issuing a clean onboard bill of lading" (*id.*), it does not appear that the Court intended to limit the duty of the carrier to weighing the container immediately prior to loading. *Amicus Curiae* believes that very few, *if any*, ports have scales available at shipside. If it had not been possible for defendants herein to have re-weighed the containers at the terminal gate, whether by reason of scale malfunction, terminal congestion or otherwise, defendants presumably *would* have been required to strip the containers in order to verify their contents.

4 Note, *Containerization and Intermodal Service in Ocean Shipping*, 21 Stan. L.R., 1077 (1969) at pp. 1087-88.

5 *Id.* at p. 1091. In the operation of *Amicus Curiae*, where, for example, the first "leg" of the carriage is by railroad, the container will *not* normally be weighed before being placed on the train. The container will be off-loaded from the train at the railhead inside the port container terminal and will be loaded aboard a Star vessel for ocean carriage without being weighed or opened. Under the holding of this case, the ocean carrier, to protect itself from insurer's liability for misrepresentation, must weigh or strip and tally each and every container upon receipt and before loading it on the vessel. This additional handling will *increase* the possibility of damage to or theft of the cargo. And if each container must be stripped, tallied and repacked because scales are not available, it will be *less* efficient to transport cargo in containers than break-bulk.

In declining to apply the unequivocal language of COGSA's § 4(5) "in any event" to the facts of the captioned proceeding, the Court of Appeals has not only deviated from the text of an international treaty; the Court has also fundamentally erred in failing to recognize that the issuance of a clean "on board" bill of lading for containerized cargo is a very different matter than the issuance of one for break-bulk cargo which can be loaded and tallied simultaneously. It is the purpose of *Amicus Curiae* to treat of the error in the decision below from the perspective of a participant in multimodal container transportation. *Amicus Curiae* respectfully submits that it is appropriate for this Court to consider the broader implications of a case which threatens to most seriously undermine developments in the very forefront of shipping technology.

Accordingly, *Amicus Curiae* respectfully requests leave to file the annexed brief.

Dated: New York, New York
May 22, 1986

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Star Shipping A/S (hereinafter "Star" or "*Amicus Curiae*") operates a fleet of over 40 ocean-going vessels, offering a multimodal liner service for containerized cargo in the Far East, Europe and the United States. The multimodal aspect of Star's operation includes, in addition to ocean carriage, both "microbridge" and "minibridge" services.[1]

Amicus Curiae, together with *all* participants in the container/multimodal transportation system, have a vital interest

1 These terms are defined at p. 2, f.n. 1 of *Amicus Curiae*'s motion for leave to file this brief to which the Court is respectfully referred.

in the decision rendered by the Second Circuit Court of Appeals in the captioned proceeding. It is the purpose of this brief to apprise this Honorable Court of the far-reaching and highly adverse impact this decision can be expected to exert on the container/multimodal "revolution" which has been of such great benefit to shippers, shipowners and inland carriers alike.

ARGUMENT

POINT I

THE DEVELOPMENT AND SIGNIFICANCE OF CONTAINERIZATION AND MULTIMODAL TRANSPORTATION

The development and rapid growth of containerization[2] in the shipping industry has been described, with reason, as a "revolution" akin to the invention of the steam engine.[3] U.S. shippers and carriers have been active participants in this "revolution."[4]

The tremendous benefits of containerization accrue to shippers, inland carriers and ocean carriers. It has been estimated that placing goods in a container permits the shipper/exporter

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2 A container has been described as ". . . a permanent reusable article of transport equipment . . . durably made of metal, and equipped with doors for easy access to the goods and for repeated use. It is designed to facilitate the handling, loading, stowage aboard ship, carriage, discharge from ship, movement and transfer of large number of packages simultaneously by mechanical means to minimize the cost and risks of manually processing each package." Simon, *The Law of Shipping Containers*, 5 J.Mar.L. & Com. 507, 513 (1974), cited by this Court in *Japan Lines* v. *County of Los Angeles*, 441 U.S. 434, 436, n.1 (1979).

3 Simon, *The Law of Shipping Containers*, *supra* at p. 507.

4 In 1982, there were two million containers in use worldwide, approximately half of which were U.S.-owned (Driscoll and Larsen, *The Convention on International Multimodal Transport of Goods*, 57 Tul. L. Rev. 183 at p. 198 (December, 1982).

to reduce packaging costs by more than one-third.[5] And because the packaging can be reduced, the *weight* of the shipment is similarly reduced so that the shipper pays less freight.[6] The packaging can be done in a fashion which secures even delicate cargo.[7] Finally, the shipper, by containerizing the cargo, provides substantial protection against pilferage.[8]

For ocean and inland carriers, the most obvious benefit of containerization is the reduction of handling costs. It has been estimated that stevedoring expenses for break-bulk cargo are in excess of five times the cost for similar containerized cargo.[9] For the ocean carrier, this reduction in stevedoring time is also significant because it permits the vessel to spend fewer days in port:

> An efficient container ship spends less than 25% of its time in port, compared to 60% for the conventional ship. Port fees are reduced, but more important, the ship is able to increase the number of voyages per year as well as its annual tonnage . . ."[10]

Most significantly, containerization is the basic building block of a multimodal transportation system:

> The theory of intermodal transport is based on the consolidation of several break-bulk units into a single interchangeable transportation unit that can be carried via a combination of several modes of transportation under a

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5 Note, *Containerization and Intermodal Service In Ocean Shipping*, 21 Stan.L.R. 1077 at pp. 1087-88 (1969).

6 *Id.*

7 This feature is most significant for those customers of *Amicus Curiae* who utilize the Star container service for shipment of electronics (from Japan) and wines and spirits (from Europe).

8 Note, *Containerization and Intermodal Service In Ocean Shipping, supra.*

9 *Id.*

10 *Id.* at p. 1088.

> single shipping document and a single freight charge from the shipper's warehouse to the consignee's warehouse. The container is the interchangeable transportation unit which it was hoped would prove to be the integrating element of an intermodal transportation system.[11]

As one commentator has noted, because multimodal transportation reduces and simplifies a shipper's export documentation, smaller shippers, who might otherwise be deterred from entering export trade because of the difficulties of contracting with several carriers and dealing with multiple bills of lading, are encouraged to ship their goods abroad.[12]

It is respectfully submitted that the decision of the Court below is essentially out-of-step with, and will seriously undermine the efforts of the U.S. shipping industry to develop an efficient and effective multimodal transportation system.

POINT II

MARINE BILLS OF LADING AND CONTAINER/ MULTIMODAL SHIPMENTS

In its undue emphasis on statements concerning quantity and weight in a marine bill of lading, the Court of Appeals failed to give *due* emphasis to the fact that a bill of lading, though issued on the form of the ocean carrier, is almost always prepared *by the shipper* (or his agent).[13] This fact assumes great significance for containerized cargo when it is considered

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11 Bissel, *The Operational Realities of Containerization and their Effect on the "Package" Limitation and the "On-Deck" Prohibition: Review and Suggestions*, 45 Tul. L. Rev. 902, 910 (1971).

12 Note, *Containerization and Intermodal Service In Ocean Shipping*, *supra*, at p. 1090.

13 This arrangement is implicitly recognized in COGSA's § 3(3) which requires the ocean carrier to *issue* a bill of lading containing information ". . . as furnished in writing by the shipper."

that containers are often packed and sealed by the shipper and so delivered to (or picked up by) the ocean carrier.

The decision of the Court below, holding an ocean carrier liable without benefit of the $500 per package limitation of liability for *any* misrepresentation concerning quantity or weight on the bill of lading, creates an absolutely unworkable situation for ocean carriers transporting containers whose contents they have never inspected. Whenever the shipper of a pre-packed and sealed container proffers to the ocean carrier a bill of lading and requests that it be "issued", the possibilities for "misrepresentation" are rife. To avoid becoming subject to insurer's liability for such misrepresentation, the carrier must open the container upon receipt, strip and tally its contents, and then repack the container, all the while risking that this increased handling will damage the goods; that they will not be repacked as the shipper intended; or that the goods may simply be stolen. It goes without saying that if the ocean carrier does what the Second Circuit Court of Appeals indicates it must do to protect its per package limitation, the effect would be to destroy *all* of the benefits conferred by containerization.

Can a carrier protect itself by simply weighing the container when the bill of lading details not only weight but also quantity (for example, the number of cartons or packages contained therein)? The decision of the Second Circuit Court of Appeals is most unclear.[14]

It is also possible that shipowners will attempt to simply delete all references to quantity and weight, in reliance on § 3(3)(c) of COGSA which provides, in relevant part:

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14 As noted at p. 3, f.n. 3 of the Motion of *Amicus Curiae* for leave to file this brief, the Court of Appeals' general statement that the shipowner must verify the contents of a container before issuing a bill of lading therefor indicating quantity and/or weight does *not* limit the carrier's responsibility to weighing. It is not clear what would have been the result in this case if the thieves had replaced the stolen ingots with a "cargo" of equal weight. The bill of lading would still have misrepresented the quantity of cargo (i.e. 100 bundles of tin ingots).

> That no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any . . . number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking. 46 U.S.C. § 1303(3)(c).

It is certainly questionable, however, whether mere receipt of a sealed container furnishes sufficient basis for suspecting that the shipper has not accurately represented the goods. And since the carrier can always open the container (however costly and risky that may be), *quaere* whether the carrier ". . . has had no reasonable means of checking" within the meaning of COGSA's § 3(3)(c). Finally, and most importantly, deletion of all information in the bill of lading concerning quantity and weight would likely not permit the bill to be negotiated. Why would a buyer agree to a documentary sales transaction if his document of title makes no reference to the quantity of goods he has purchased?

Nor is it likely that shipowners could avoid the drastic consequences of the decision below by inserting words in the bill of lading (in a situation where the container is packed and sealed by the shipper) such as "shipper's load, count and stow".[15]

The foregoing discussion demonstrates that, although the misrepresentation dealt with by the Court of Appeals in the captioned proceeding pertained to the "on board" statement on the bill of lading, there is no logical reason that the Court's decision would not also be applied to misrepresentations on "received for shipment" bills of lading. As a result, ocean

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15 Interestingly, the Pomerene Act, 49 U.S.C. §§ 81 *et seq.*, would appear to permit just such a reservation in the case of shipper-packed containers (49 U.S.C. § 101). The Pomerene Act only applies, however, to outbound shipments. As far as inbound shipments are concerned, the Second Circuit Court of Appeals has held that "shipper's load and count" reservations on a bill of lading, even for shipper-packed and sealed containers, are basically meaningless. *Westway Coffee Corp* v. *M/V NETUNO*, 675 F. 2d 30 (1982).

carriers will expose themselves to increased liability whenever they issue bills of lading containing particulars concerning quantity and weight for cargo which has been packed into containers by the shipper.

The only *certain* means by which an ocean carrier can preserve its per package limitation is to pack every container itself or to open, strip and tally every pre-packed container. In either event, containerization becomes a burden, not a benefit. And it is certainly not only—or even primarily—the ocean carrier that will suffer the consequences. It is the shipper's goods which will be subject to increased handling; and it is the shipper who will inevitably bear the increased costs which will necessarily be incurred if ocean carriers comply with the directive of the Second Circuit Court of Appeals in order to avoid insurer's liability.

Misrepresentations concerning "on board" bills of lading, with which the decision below is specifically concerned, constitute an obvious risk whether containers are stuffed by shippers or packed by ocean carriers. In either event, it is not only common but usual for containers to remain at the terminal for more than 24 hours between the time of receipt and the time of loading on board the vessel. As in the case at bar, they may not even be in the custody or control of the ocean carrier during that period of time.

The Second Circuit Court of Appeals has ruled that shipowners have a *minimum* duty to weigh containers at shipside immediately before loading. *Amicus Curiae* submits that there are few, *if any*, ports in the world which have facilities for weighing containers at shipside. As a result, containers will have to be transported back to the container terminal entrance (or wherever the terminal scales are located) prior to being loaded aboard ship. This might well require moving surrounding containers in order to isolate the container which is to be loaded. It is no exaggeration to say that such a procedure is so impractical and costly that ocean carriers simply will not do it. Rather, they will risk imposition of insurer's liability which will

then be passed on to shippers and consignees in the form of increased freight. It is the small shipper, for whom containerization and multimodal transportation has been a boon, who will bear the true burden of the decision in this case.

It is important to note that the ocean carrier may not refuse to make an "on board" representation on a bill of lading as he can with respect to the quantity or weight of the goods. Under COGSA's § 3(7):

> After the goods are loaded, the bill of lading to be issued by the carrier, master or agent of the carrier to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading . . . 46 U.S.C. § 1303(7).

An "on board" statement is also required for marine bills of lading under the *Uniform Customs and Practice for Documentary Credits*, I.C.C. Publication No. 400 (1983), Article 26 (a)(ii) and (c)(iii).[16] Nor can ocean carriers avoid an "on board" statement on a multimodal bill of lading by providing for "intended vessel."[17]

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16 As the Court of Appeals noted, an "on board" bill of lading is often required by the underlying sales agreement between shipper and consignee (*Petition*, p. 13a). In "FOB", "C.I.F." or "C&F" contracts, the risk of loss of or damage to the goods is transferred from seller to buyer at the ship's rail (*Guide to Incoterms*, I.C.C. Publication No. 320 [1979] pp. 22-28).

17 Article 26(c)(iii) of the *Uniform Customs and Practice for Documentary Credits, supra*, provides that banks will reject a document which: "contains the indication 'intended' or similar qualification in relation to the vessel and/or the port of loading unless such document bears an on board notation in accordance with Article 27(b) and also indicates the actual port of loading". However, if a documentary sales transaction does not require a *marine* bill of lading, Article 25 provides that banks may accept transport documents which indicate *either* "taking in charge" or "loading on board". Thus, the ocean carrier *must* issue an "on board" bill of lading for a multimodal shipment. The decision below, by imposing insurer's liability for "on board" misstatements, will inevitably force ocean carriers to increase their freight and therefore, reduce the competitive position of ocean carriers vis-a-vis other carriers who need not issue "on board" bills of lading.

The Court of Appeals' imposition on ocean carriers of liability without benefit of the $500 per package limitation for misstatements in "on board" or "received for shipment" bills of lading will be particularly onerous in a multimodal shipment situation. In the multimodal operations of *Amicus Curiae*, where pre-carriage is often by rail or barge, containers are usually not weighed before being placed on the railroad/barge. The containers are then off-loaded at the port container terminal where they remain for at least 24 hours before being loaded aboard a Star vessel. They are not customarily weighed at the container terminal either upon receipt from the railroad/barge[18] or immediately prior to being loaded. Bills of lading issued for the cargo are invariably prepared by the shipper's agent who is in the best position to furnish particulars concerning quantity and weight.

To comply with the decision in this case, Star and other carriers similarly situated would have to ensure, at the very least, that every port container terminal used by their vessels install weight scales at railheads and stringpieces in sufficient number that every container entering such terminal can be weighed upon entry *and* immediately prior to loading. Even if this were possible (and there is certainly no guarantee that port terminals the world over would agree), it would destroy all of the benefits of containerization/multimodal transport discussed earlier in this brief.

In 1980, multimodal transportation was the subject of a United Nations Convention which considered, *inter alia*, the specific problem of misrepresentations in multimodal transport documents.[19] Article 11 thereof provides that a carrier's lia-

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18 The procedure where pre-carriage is by truck is slightly different in that the truck normally will pass over weight scales located at the terminal gates, so that the weight of the containers being carried can easily be ascertained.

19 *Convention on International Multimodal Transport of Goods*, U.N. Doc. TD/MT/CONF/16(1980), reproduced in Driscoll and Larsen, *The Convention on International Multimodal Transport of Goods*, 57 Tul. L. Rev. 193 (December, 1982).

bility for false information in a multimodal transport document is to be without benefit of a per package limitation of liability *only* if the document is issued ". . . with intent to defraud". It is respectfully submitted that the Convention recognizes what the Second Circuit Court of Appeals in this case did not: that to penalize ocean carriers for innocent or negligent misstatements on bills of lading will undermine the continued development of multimodal/container transportation.

POINT III

THE DECISION BELOW IS IN CONFLICT WITH PAST AND CONTINUING EFFORTS BY CARRIERS AND SHIPPERS TO ACHIEVE A UNIFORM, SIMPLIFIED AND PREDICTABLE SET OF RULES TO GOVERN INTERNATIONAL TRANSPORTATION

The *Convention on International Multimodal Transport of Goods*, the *Uniform Rules for a Combined Transport Document*[20] and the *Uniform Customs and Practice for Documentary Credits*, *supra* all represent a substantial, continuing effort to streamline international commerce and transportation. This effort is not, however, of recent origin. The Hague Rules, implemented by the U.S. and other maritime nations, were designed to achieve the same end: the creation of a balanced and predictable transportation system.[21]

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20 I.C.C. Publication No. 298 (1975; reprinted 1980).

21 At Congressional hearings held in connection with the Hague Rules, the Chairman of the I.C.C. Bill of Lading Committee emphasized that ". . . the most important thing of all in international transportation [is] to draw the line with reasonable honesty, trying to do reasonable justice to all sides, but drawing the line at some place for all countries, so you could make some system possible. If the underwriter can insure, the banker knows his righs, the carrier knows his risks and can cover himself, you have a system. but when you have every nation with a

In failing to apply the clear words of COGSA's § 4(5) "in any event", the Court of Appeals has rejected the past and continuing efforts of the international shipping community to achieve uniformity. And in describing defendant's innocent misrepresentation as a "fundamental breach" depriving it of all defenses or limitations of liability in the contract of carriage, the Court has inappropriately interfered with the delicate balance, achieved by the Hague Rules, of the competing interests of shipper, carrier and consignee.[22]

A close reading of the decision below reveals that the Court of Appeals has treated an innocent or negligent misrepresentation in an ocean bill of lading as giving rise to a cause of action

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different law and every carrier with a different bill of lading, you have absolute chaos." *Hearings before the Committee on the Merchant Marine and Fisheries*, House of Representatives, 68th Congress, 2d Session, January 28/29, 1925.

This sentiment was echoed by the Secretary of State in 1936 when he urged Congress to implement the Hague Rules without amendment: "The uniformity in the laws of all maritime nations which it is sought to advance by the adoption of the international rules concerning bills of lading for the carriage of goods by sea as embraced in the convention will be unattained, to the extent to which the provisions of laws enacted by the U.S. or by other countries differ in detail from the international rules." *Report from Committee of Merchant Marine and Fisheries*, Report No. 2218, 74th Congress, 2d Session (1936).

22 It is noteworthy that the doctrine of "fundamental breach" as a rule of law ousting exculpatory or liquidated damages provisions in contracts (which, at one time, was embraced by the English Court of Appeals) has been severely criticized and was ultimately rejected by the House of Lords (*Suisse Atlantique Societe D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] A.C. 361 (1966); *Photo Production Ltd.* v. *Securior* [1980] 1 All E.R. 556). See, also, Coote, *The Second Rise and Fall of Fundamental Breach*, 55 Australian Law L.J. 788.

In *Photo Production, Ltd.* v. *Securior*, the House of Lords was particularly influenced by the passage of the Unfair Contract Terms Act of 1977 by which the English Parliament regulated the use of exculpatory clauses in certain types of standard form contracts. *Amicus Curiae* submits that the adoption of the Hague Rules by the world community similarly removed the need for the judicial interventionism which the opinion below represents.

that is, in essence, separate from, or alternative to an ordinary breach of contract cause of action.[23]

The Court of Appeals' analysis appears to be a sequel to its decision in *Elgie & Co.* v. *S.S. S.A. NEDERBURG,* 599 F. 2d 1177 (1979), *cert. denied* 444 U.S. 1072 (1980). In *Elgie & Co.,* which involved a shipment from the United States, the Court "applied" § 22 of the Pomerene Act, 49 U.S.C. §§ 81 *et seq.* and held that the carrier could not limit its liability for a misrepresentation in the bill of lading because the Pomerene Act does not contain limitation of liability provisions. As the Court acknowledged in its decision in the case at bar (*Petition*, p. 17(a), f.n. 4), the bill of lading in *Elgie & Co.* provided for the application of COGSA to the entire period of time that the goods were in the carrier's custody. Thus, in *Elgie & Co.*, the Court of Appeals implicitly held that § 22 of the Pomerene Act creates a separate cause of action to which COGSA defenses and the $500 per package limitation of liability do not apply.

Amicus Curiae submits that *Elgie & Co.* was wrongly decided and that the decision in the case at bar is similarly in error. Section 22 of the Pomerene Act was enacted in response to the line of authority, beginning with the English decision of *Grant* v. *Norway,* 10 C.B. 665, 138 Eng. Rep. 263 (C.P. 1851), holding that a carrier could not be liable for non-receipt of cargo to a third-party who had relied upon a false representation in a bill of lading that the cargo had been loaded. These decisions[24] proceeded on the theory that the issuer of the bill of lading only had authority to issue bills of lading for goods actually loaded on board the vessel and could not bind the vessel owner by false representations. As a result of the enactment of § 22 of the Pomerene Act, a carrier was estopped

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23 See, for example, the Court's statement that plaintiff's suit ". . . is not based on the theft of the ingots or on Ivarans' negligence but on the carrier's false representation that it loaded the 70 containers [sic] on its ship." (*Petition*, p. 17a).

24 For U.S. decisions, see *Schooner Freeman* v. *Buckingham*, 59 U.S. (18 How.) 182 (1855); *The Lady Franklin*, 75 U.S. (8 Wall.) 325 (1868); *Pollard* v. *Vinton*, 105 U.S. 7 (1881).

from arguing that a bill of lading was issued without its authority in these circumstances, *Portland Fish Company* v. *States Steamship Company*, 510 F.2d 628, at p. 632 (9th Cir. 1974). See, generally, Murray, *History and Development of the Bill of Lading*, 37 U. of Miami L.R. 689.

There is nothing in the legislative history of the Pomerene Act or COGSA which justifies the *Elgie & Co.* holding that a bill of lading misstatement gives rise to a cause of action which is to be adjudicated without reference to the other terms of the contract of carriage. *At most,* application of the principle codified by § 22 of the Pomerene Act gives rise to an estoppel which precludes the carrier from denying (as against a holder who was relied thereon) the receipt of cargo as described in the bill of lading. *Portland Fish Company* v. *States Steamship Company, supra.*[25]

The Court of Appeals' treatment of bill of lading misrepresentations is in conflict with the basic goal of multimodal transportation to establish a single contract between the shipper and multimodal carrier which can be enforced in accordance with agreed upon principles of contractual liability. Carving out a "misrepresentation" cause of action, but only for quantity and weight on ocean bills of lading, cannot possibly be reconciled with the creation of a uniform, multimodal contract of carriage.

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25 Significantly, the Court of Appeals in *Portland Fish*, in response to applications by ocean carriers to file briefs *amicus curiae* concerning the effects of this decision on containerization, stated: "Since the case before us involves solely a bulk shipment subject to piece count, the questions thus raised will have to wait another day for decision. We intimate no opinion on them." 510 F.2d at p. 634. *Amicus Curiae* respectfully suggests that the "answer" can be found in § 21 of the Pomerene Act (49 U.S.C. § 101) which relieves a carrier from liability for non-receipt of cargo loaded by a shipper.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* prays that a writ of certiorari to the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

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